SUPREME COURT, U. S.

JUN 17 1976

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1162

WINTERS BATTERY MANUFACTURING COMPANY,
Petitioner,

v.

W. J. USERY, JR., Secretary of Labor,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROLAND M. LOWELL,
618 Hamilton Bank Building,
Nashville, Tennessee 37219,
Attorney for Petitioner.

BUCK & BAKER
Of Counsel

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

6-14-76-58

TABLE OF CITATIONS

Cases:

Atlas Roofing Co., Inc. v. OSHRC,
518 F.2d 990 (5th Cir. 1975) 2

Brennan v. Winters Battery Mfg. Co.,
531 F.2d 317, 325 (6th Cir. 1975) 2

Frank Irey, Jr., Inc. v. OSHRC,
519 F.2d 1200 (3rd Cir. 1975) 2

Massey v. United States,
291 U.S. 608, 610 3

Sanitary Refrigerator Co. v. Winters,
280 U.S. 30, 34, footnote 1 (1929) 3

Schriber-Schroth Co. v. Cleveland Trust Co.,
305 U.S. 47, 50 (1938) 4

Yakus v. United States,
321 U.S. 414 (1944) 5

Statutes:

29 U.S.C. § 651(b)(1) 3

29 U.S.C. § 659(c) 3

Miscellaneous:

Solzhenitsyn, The Gulag Archipelago,
(N.Y. Harper & Row Paperback, 1974) p. 284 ... 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1162

WINTERS BATTERY MANUFACTURING COMPANY,
Petitioner,

v.

W. J. USERY, JR., Secretary of Labor,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

The petitioner, Winters Battery Manufacturing Company, respectfully prays the Court for a rehearing of the denial of its petition for writ of certiorari in this case on the following grounds:

I

Since filing of the petition in this case on February 17, 1976, this Court has granted writs of certiorari in *Atlas*

Roofing Co., Inc., v. OSHRC, 518 F.2d 990 (5th Cir. 1975), and *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3rd Cir. 1975), under this Court's docket numbers 75-746 and 75-748, which were consolidated for consideration of the following question:

> "2. Assuming arguendo that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution."
>
> —44 Law Week 3531

This same question was included in this petitioner's third question in its original petition to this Court in this case at page 3 as follows:

> "3. Whether, even if the penalties be deemed civil as designated in 29 U.S.C. § 666, they can be imposed by an administrative tribunal or otherwise without a jury trial or appeal as guaranteed by the Seventh Amendment, or without any impartial hearing consistent with due process of law under the Fifth Amendment."

The Court of Appeals for the Sixth Circuit specifically relied upon the *Atlas* and *Irey* cases in rejecting this and other constitutional contentions without discussion. *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 325 (6th Cir. 1975); see same opinion as set out in Appendix A to the original petition herein at pp. 43-44.

In addition, the respondent has relied on these cases on this question both in the court below and in its response to the petition for certiorari herein. See Response, p. 6, footnote 4, and p. 8.

BLEED THROUGH

The petitioner submits that this is an intervening circumstance of substantial and potentially controlling effect within the meaning of Rule 58(2) of the Rules of this Court. See *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34, footnote 1 (1929), and *Massey v. United States*, 291 U.S. 608, 610 (1934).

The petitioner therefore prays that the writ of certiorari be granted in this case and that the case be consolidated with the *Atlas* and *Irey* cases for briefing and oral argument on the merits, or, in the alternative that final decision on the petition for certiorari be withheld pending decision of the question presented in the consolidated *Atlas* and *Irey* cases.

II

To the knowledge of present counsel the opinion of the United States Court of Appeals for the Sixth Circuit in the present case, now published at 531 F.2d 317, is the only case in which the question of the validity of the 15-day waiver rule of the Occupational Safety and Health Act, 29 U.S.C. § 659(c) has been squarely passed upon in a case in which the employer affected had failed to protest the proposed penalty within 15 working days. With denial of certiorari in this case on record, it is highly unlikely that another holding squarely in conflict with this case will occur.

First, the message is already spreading to employers that in OSHA cases, it is better to litigate than cooperate, despite the objective of voluntary compliance stated by Congress. 29 U.S.C. § 651(b)(1). Second, the procedural difficulties of presenting the question after the 15-day period has passed are virtually insurmountable.

The petitioner respectfully submits that this brings the case within the rationale of *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (1938), in which circumstances showed that only the Sixth Circuit was likely to pass on the particular question presented in that case.

In addition to the matters presented in the argument on pages 14-16 of the original petition for certiorari in the present case showing the importance of a definitive narrowing by this Court of the limits of administrative penalties, particularly without effective appellate review, the Court may well note the following pertinent quotation from a Nobel Laureate who has suffered the ultimate logic of such penalties:

> "The OSO did not claim to be handing down a *sentence*. It did not sentence a person but, instead, ***imposed an administrative penalty*** And that was the whole thing in a nutshell. Therefore it was, of course, natural for it to have juridical independence!" [Emphasis in original.]
>
> —*Solzhenitsyn, The Gulag Archipelago,* (N.Y. Harper & Row Paperback, 1974) p. 284

The author then goes on to note that the administrative penalty could be a sentence of up to 25 years, and include forfeiture of all property and rights without appeal.

Of course, under the Occupational Safety and Health Act, the Court below will review a case like the present in a proceeding for enforcement, but the Court below will only consider constitutional questions. No other review is afforded. The Court below ruled adversely on virtually all such constitutional questions that could be raised.

BLEED THROUGH

The advancement of administrative power from *Yakus v. United States*, 321 U.S. 414 (1944), to the present case in 32 years has been at a geometric rate compared to that made between the demise of the Star Chamber and the legislation that led to the *Yakus* decision. It is time to place limits on the *Yakus* case and there is no better case than this for the purpose.

Respectfully submitted,

ROLAND M. LOWELL,
618 Hamilton Bank Building,
Nashville, Tennessee 37219,
Attorney for the Petitioner.

BUCK & BAKER
Of Counsel

CERTIFICATE OF COUNSEL

I, Roland M. Lowell, attorney for the petitioner certify that the foregoing petition for rehearing is not submitted for purposes of delay except as such delay is specifically requested in the alternative in Part I for purposes directly related to the rights of the petitioner on the merits.

ROLAND M. LOWELL